



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

June 12, 2015

PR 15-25

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. West Greenwich Police Department

Dear Ms. Levin:

The investigation into your Access to Public Records Act ("APRA") complaint filed on behalf of Access/Rhode Island against the West Greenwich Police Department (Police Department" or "WGPD") is complete. You allege the Police Department violated the APRA when it:

1. failed to timely respond to MuckRock's APRA request for written procedures (21 business days), see R.I. Gen. Laws § 38-2-3(e);
2. failed to timely respond to MuckRock's APRA request for a copy of police logs for the past week (39 days), see R.I. Gen. Laws § 38-2-3(e);
3. failed to timely respond to MuckRock's APRA request for arrest record information for the past twenty-four hours (15 business days), see R.I. Gen. Laws § 38-2-3(e); and
4. failed to timely respond to MuckRock's APRA request for arrest log information for the past twenty-four hours (11 business days), see R.I. Gen. Laws § 38-2-3(e).

In response to your complaint, we received a substantive response from the Police Department's legal counsel, Michael A. Ursillo, Esquire, who also provided an affidavit from Police Chief Richard N. Ramsay. Police Chief Ramsay's affidavit provides:

'During the spring and summer of 2014, the WGPD received four requests under the Access to Public Records Act (APRA) from Shawn Musgrave of MuckRock.

Each request was sent via facsimile. The WGPD has no record that any of the four faxed requests were actually received on the day it was sent.

During the spring and summer of 2014, major renovations to the police station were ongoing. The construction caused issues with the telecommunications system and the police station fax machine was inoperable from time to time.

The request from Mr. Musgrave contained a mailing address and an email address but did not contain a phone number or fax number.

\* \* \*

On or about March 31, 2014, Mr. Musgrave sent a fax to the WGPd that requested '[w]ritten procedures for access to the agency's public records, including any request forms required or suggested by the agency.' The WGPd has no record of this fax on file.

I became aware of this request on or about April 15, 2014, when Mr. Musgrave sent another fax to the WGPd to follow up on the request.

At some point between April 15, 2014, and April 29, 2014, I attempted several times to send a response to this request via the email address specified in the request. The emails came back undeliverable. I now have a new computer and am unable to retrieve copies of the emails I attempted to send.

On or about April 29, 2014, I mailed a response to Mr. Musgrave at the mailing address specified in the request.

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On or about May 7, 2014, Mr. Musgrave sent a fax to the WGPd that requested '[a] copy of the police log for the past week (7 days).' The WGPd has no record of this fax on file.

On or about May 22, 2014, and May 27, 2014, Mr. Musgrave sent faxes to the WGPd to follow up on his request. The WGPd has no records of these faxes on file.

On or about June 26, 2014, at 11:42 P.M., Mr. Musgrave sent an email to the WGPd to follow up on the request. Sergeant Richard N. Brown was copied on this email.

On or about June 28, 2014, Sgt. Brown sent an email to Mr. Musgrave at the email address specified in the request. Sgt. Brown advised Mr. Musgrave that major renovations to the police station were ongoing and had caused issues with the building's telecommunications systems, including phone, fax, and Internet. Sgt. Brown further advised Mr. Musgrave that he would be addressing his records request.

On or about June 28, 2014, Sgt. Brown mailed a response to this request to Mr. Musgrave at the mailing address specified in the request.

\* \* \*

On or about June 9, 2014, Mr. Musgrave sent a fax to the WGPD that requested '[a]ll arrest records, including narrative, for the past 24 hours from the time this request is received.' The WGPD has no record of this fax on file.

On or about June 24, 2014, Mr. Musgrave sent a fax to the WGPD to follow up on the request. That day, Sgt. Richard Brown mailed a response to Mr. Musgrave at the mailing address specified in the request.

\* \* \*

On or about July 30, 2014, Mr. Musgrave sent a fax to the WGPD that requested '[a] copy of the arrest log for the past 24 hours.' The WGPD has no record of the fax on file.

On or about August 7, 2014, Mr. Musgrave sent a fax to the WGPD to follow up on his request. The WGPD has no record of this fax on file.

On or about August 15, 2014, Mr. Musgrave sent an email to the WGPD to follow up on the request. Sergeant Richard N. Brown was copied on this email.

On or about August 20, 2014, Sgt. Richard Brown mailed a response to Mr. Musgrave at the mailing address specified in the request. The response included not only the arrest log for the past 24 hours from July 30, 2014, but also included an additional 24 hours before and after that date."

Mr. Ursillo raises Access/Rhode Island's standing to file this complaint<sup>1</sup> and also relates that:

'Sergeant Richard N. Brown informed Mr. Musgrave [on June 28, 2014] that problems existed with the [Police Department's] telecommunications system due to major construction/renovation at the police station. The appendices provided with the complaint indicate that Mr. Musgrave contacted the [Police Department] exclusively through fax and email and did not provide the [Police Department] with his phone number. It is also noteworthy that Chief Ramsay attempted several times to send a response to Request No. 1 via email, but those emails came back undeliverable. These facts are offered not to excuse the [Police Department's] failure to comply with the statutory deadline to produce the requested records, but to show that there were legitimate and honest reasons why

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<sup>1</sup> With respect to the arguments that Access/Rhode Island lacks standing to file the instant complaint, we previously addressed this issue in a related complaint and our conclusion is equally applicable to this case. See Access/Rhode Island v. West Warwick School Department, PR 15-24. As such, we review this complaint solely on the basis of this Department's independent statutory authority. R.I. Gen. Laws § 38-2-8(d).

the [Police Department] did not respond to the requests within 10 business days (or for Request No. 4, within 48 hours).

By letter dated February 3, 2015, which was actually received by this Department on May 4, 2015 due to an error, you provided a rebuttal.

At the outset, we observe that in examining whether an APRA violation has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether a violation has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Police Department violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA provides that:

'[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request. Any such explanation must be particularized to the specific request made. In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is necessary to avoid imposing an undue burden on the public body.' R.I. Gen. Laws § 38-2-3(e)(emphasis added). See also R.I. Gen. Laws § 38-2-7.

In addressing these allegations, and consistent with the emphasized language set forth above, it is important to recognize that Chief Ramsay's affidavit indicates that:

'[d]uring the spring and summer of 2014, major renovations to the police station were ongoing. The construction caused issues with the telecommunications system and the police station fax machine was inoperable from time to time.'

This averment is uncontradicted, and indeed, attached to your complaint is a document indicating that one or more e-mails were sent back or not delivered, apparently from the Police Department to MuckRock.

With respect to your first allegation, you contend that MuckRock faxed to the Police Department an APRA request dated March 31, 2014, but Chief Ramsay's affidavit relates that the Police Department 'has no record of this fax on file' and 'became aware of this request on or about April 15, 2014[.]' Chief Ramsay Affidavit, ¶¶ 10 & 11. No evidence has been presented to contradict these assertions and no fax confirmation has been provided by Access/Rhode Island (or MuckRock) to this Department to evidence delivery on March 31, 2014. Since the evidence is

uncontradicted that the Police Department did not receive MuckRock's March 31, 2014 APRA request until April 15, 2014, and since the Police Department responded to this request within ten (10) business days, *i.e.*, on or before April 29, 2014, we find no violation. See Eikeland v. Bristol Police Department, PR 11-28 (no evidence submitted to contradict assertion that facsimile was not received).<sup>2</sup>

Next, you contend that the Police Department failed to timely respond to MuckRock's May 7, 2014 APRA request seeking the police log for the past seven (7) days, but again, the uncontradicted evidence establishes that the Police Department never received MuckRock's facsimiles sent on May 7, 2014, May 22, 2014, or May 27, 2014. See Chief Ramsay Affidavit, ¶¶ 14 & 15. Again, no fax confirmation has been provided by Access/Rhode Island (or MuckRock) to this Department to evidence delivery. Instead, the evidence reveals that on June 1, 2014, June 6, 2014, and June 23, 2014, MuckRock sent follow-up inquires to the Police Department via e-mail. These e-mails represented MuckRock's first attempt to contact the Police Department through e-mail as opposed to through facsimile. While Chief Ramsay's affidavit affirmatively states that the Police Department never received the facsimiles dated May 7, 2014, May 22, 2014, or May 27, 2014, there is no evidence or affirmation that the Police Department did not receive MuckRock's June 1, 2014 APRA request. In the absence of such evidence or affirmation, we must presume that the Police Department received MuckRock's June 1, 2014 e-mail, and accordingly, the Police Department's failure to respond to this request (as received on June 1, 2014) until June 28, 2014 violated the APRA. See R.I. Gen. Laws §§ 38-2-3(e); 38-2-7.

You also claim that the Police Department failed to respond timely to MuckRock's June 9, 2014 APRA request, which sought all arrest records for the past twenty-four (24) hours. Even though MuckRock had e-mailed the Police Department on June 1, 2014 regarding a separate APRA request, see supra, the June 9, 2014 APRA request was sent via facsimile and Chief Ramsay's affidavit affirms that the Police Department "has no record of this fax on file." No evidence has been presented to contradict this assertion and neither Access/Rhode Island nor MuckRock has provided this Department a fax confirmation to evidence delivery on June 9, 2014. On June 24, 2014, MuckRock sent another facsimile to the Police Department and on this same date—June 24, 2014—the Police Department (Sergeant Brown) responded. Sergeant Brown indicated:

"I have [a] June 24, 2014 [request] but I also see a request for June 9, 2014. I am unaware of any request of June 9, 2014."

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<sup>2</sup> There is no evidence that the Police Department sought to obfuscate the APRA process and for the reasons discussed herein, the evidence actually contradicts any suggestion to this effect. It is also significant that MuckRock—as well as any other citizen—had alternative avenues to seek public records maintained by the Police Department during this timeframe, at the very least, by e-mail. See infra. It is not lost upon this Department that the means chosen by MuckRock to make the instant APRA request was by facsimile—an avenue that would provide the requester with near-immediate confirmation that an APRA request had been successfully transmitted or had not been successfully transmitted. As repeatedly noted in this finding, this Department has not been provided with any facsimile confirmation documents.

The content of Sergeant Brown's June 24, 2014 response corroborates Chief Ramsay's affidavit. Since the uncontradicted evidence reveals that the Police Department did not receive an APRA request for arrest records until June 24, 2014, and since the Police Department responded to this request on June 24, 2014, we find no violation. See R.I. Gen. Laws § 38-2-3(e)("[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request")(emphases added). Again, it is noteworthy that neither Access/Rhode Island nor MuckRock has provided a fax confirmation to this Department to evidence delivery prior to June 24, 2014. See Eikeland, PR 11-28.

Lastly, you claim that the Police Department failed to respond timely to MuckRock's July 30, 2014 APRA request seeking "[a] copy of the arrest log for the past 24 hours," to include certain information delineated within R.I. Gen. Laws § 38-2-3.2. While R.I. Gen. Laws § 38-2-3.2 requires a Police Department to provide such information "within forty-eight (48) hours after receipt of a request unless a request is made on a weekend or holiday, in which event the information shall be made available within seventy-two (72) hours," MuckRock's July 30, 2014 APRA request expressly indicated that it "look[s] forward to receiving your response to this request within 10 business days, as the statute requires." MuckRock's representation—made in its July 30, 2014 APRA request to the Police Department—that it "look[s] forward to receiving [the Police Department's] response to this request within 10 business days," represents a waiver of the timeframe set forth in R.I. Gen. Laws § 38-2-3.2. See Gallucci v. Brindamour, 477 A.2d 617, 618 (R.I. 1984) ("Generally, a party or parties for whose benefit a right is provided by constitution, by statute, or by principles of common law may waive such right, regardless of the plain and unambiguous terms by which such right is expressed").

Here, you relate that MuckRock made the instant APRA request by facsimile sent on July 30, 2014 and August 7, 2014, but again, Chief Ramsay's affidavit affirms that neither request was received and neither Access/Rhode Island nor MuckRock has provided any evidence or fax confirmation to the contrary.<sup>3</sup> See Chief Ramsay Affidavit, ¶¶ 21 & 22. Rather, the evidence establishes that MuckRock sent a follow-up inquiry—by e-mail on August 15, 2014 to Sergeant Brown—and that Sergeant Brown responded to this APRA request on August 20, 2014. Since MuckRock indicated in its request that it "look[s] forward to receiving [the Police Department's] response to this request within 10 business days," consistent with our discussion supra, the Police Department's response was timely (as set forth in MuckRock's request) and we find no violation. See Eikeland, PR 11-28.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). In this case, for the reasons discussed in West Warwick School Department, PR 15-24, we have reviewed this matter pursuant to the Attorney General's independent statutory authority, and accordingly, any complaint or further action must be initiated by this Department

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<sup>3</sup> MuckRock's August 15, 2014 e-mail indicates that it had sent an APRA request via facsimile on July 30, 2014 and August 7, 2014 and that "[b]oth times we received confirmations that the fax went through." Despite this comment, no fax confirmation documents were submitted to this Department.

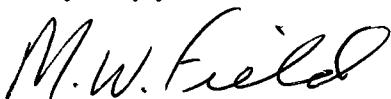
on behalf of the public interest and not the Complainant. R.I. Gen. Laws § 38-2-8(d). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter\*\*\*.” See R.I. Gen. Laws § 38-2-9(d).

In this case, we find neither remedy is appropriate. Specifically, the Police Department provided MuckRock with the documents it requested in its May 7, 2014 APRA request, and accordingly, injunctive relief is not appropriate. Furthermore, the evidence is clear and uncontradicted that during the time period of the instant violation major renovations were ongoing at the Police Department where communication equipment was temporarily rendered non-operational. Based on this undisputed fact and the totality of circumstances, we find insufficient evidence to support a willful and knowing, or reckless, violation. Even your rebuttal references the “mitigating factors” discussed herein and acknowledges that “the [Police] Department’s explanation for the delays may be a factor to consider in determining appropriate remedies.”

Although the Attorney General will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Whether Access/Rhode Island would have standing to do so is, of course, a decision within the jurisdiction of the Superior Court and not this Department. This finding does serve as notice to the Police Department that its omission violated the APRA and may serve as evidence in a future similar situation of a willful and knowing, or reckless, violation. We are closing this file as of the date of this correspondence.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours

A handwritten signature in black ink, appearing to read "M. W. Field". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Michael W. Field  
Assistant Attorney General

Cc: Michael Ursillo, Esquire